APPENDIX A

Mar. 14, 1997

ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1996-97

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2951068

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ROY C. CHEATHAM, *et al.*

v.

RALPH P. EAGERTON, as commissioner, *et al.*

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Appeal from Montgomery Circuit Court
(CV-94-290)

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YATES, Judge

The plaintiffs, on behalf of a class of more than 800 federal law enforcement officers, sued the State of Alabama commissioner of revenue, seeking a judgment declaring that the State law enforcement officers' $8-per-day subsistence allowance exemption from Alabama income tax, pursuant to § 36-21-2(b), Ala. Code 1975, creates a discriminatory tax scheme in violation of the intergovernmental tax immunity doctrine and 4 U.S.C.A., § 111 (West 1985) (the Public Salary Tax Act of 1939). The plaintiffs moved for a summary judgment. The parties entered a joint stipulation of facts, agreeing that the issue

could be resolved as a matter of law. The court entered a summary judgment in favor of the commissioner; the plaintiffs appeal.

The undisputed facts are as follows: All employees of the State of Alabama are paid according to the Merit System Act. §§ 36-26-1 through -108, Ala. Code 1975. Certain state law enforcement officers receive an $8-per-working-day subsistence allowance, pursuant to § 36-21-2(a). Section 36-21-2(b) specifically exempts the allowance from Alabama income tax.

In 1977, the Alabama Legislature enacted a joint resolution stating that the subsistence allowance was never intended to be compensation. According to the resolution, the allowance was intended as a reimbursement for meal expenses incurred while the officers are on duty. The legislature recognized that officers' duties routinely removed them from their home base, thereby necessitating the purchase of meals. Act No. 763, 1973 Regular Session (Ala. Acts 1973, p. 1145).

The plaintiffs do not receive any form of daily subsistence allowance that is comparable to the state officers' allowance. The plaintiffs, however, are reimbursed per diem for business travel expenses. The state officers also receive travel reimbursement, in addition to the subsistence allowance. Neither the plaintiffs nor the state officers are taxed on their per diem reimbursements.

The dispositive issue is whether the tax scheme at issue violates the doctrine of intergovernmental tax immunity and 4 U.S.C.A., § 111.

The intergovernmental tax immunity doctrine is a core tenet of federalism that prevents either the Federal Government or the state governments from directly taxing the activities of the other. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). "[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private

parties with whom it does business . . . as long as the tax does not discriminate against the United States or those with whom it deals." *South Carolina v. Baker*, 485 U.S. 505, 523 (1988). Section 111, 4 U.S.C.A., provides, in part, that states may tax the pay of federal employees for personal services if such taxation does not discriminate because of the "source" of the compensation.

In *Davis*, the United States Supreme Court considered the validity of Michigan's income taxation of Federal Government benefits, based on the intergovernmental tax immunity doctrine and § 111. Under Michigan's tax scheme, the retirement benefits received by former state and local government employees were exempt from Michigan income tax, but the retirement benefits received by all other persons, including former employees of the Federal Government, were subject to Michigan tax. The Supreme Court held that § 111 and the intergovernmental tax immunity doctrine forbids Michigan from treating federal and state retirement income differently for tax purposes.

Subsequently, in *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *cert. quashed*, 611 So. 2d 1069 (Ala. 1993), this court held that Alabama's income taxation of military retirement benefits violated § 111 and the doctrine of intergovernmental tax immunity.

The plaintiffs rely on the same analysis applied in *Davis* and *Rinehart* to support their position. We, however, are of the opinion that the situation here is not analogous to the situation in either *Davis* or *Rinehart*.

It is undisputed that the plaintiffs do not receive a comparable daily subsistence allowance from the Federal Government. It is also undisputed that the regular merit system salary of the state officers is taxed the same as the regular pay of the plaintiffs. Alabama is not giving differential tax treatment based on the "source" of the income. It simply is not giving a tax credit to law enforcement officers for pay not received.

In entering the summary judgment in favor of the commissioner, the court concluded:

> "The inter-governmental tax immunity doctrine requires States to treat both federal and state employees the same but it does not require a State to give tax credits to employees for compensation not actually received by them. The Alabama Legislature chose to provide certain law enforcement officers with an additional allowance and the federal government has not. Whether or not federal law enforcement officers are given such benefits is in the province of the federal government and not state government or this Court. Of course, if they did receive such an allowance the State of Alabama would be required to give the same tax benefits to them as provided to state law enforcement officers."

We find the court's order to be sound and well reasoned. We agree that the tax scheme in question does not discriminate because of the "source" of the pay or compensation and, therefore, does not violate the intergovernmental tax immunity doctrine or § 111.

AFFIRMED.

Robertson, P.J., and Monroe, Crawley, and Thompson, JJ., concur.

**APPENDIX B**

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

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CV-94-290-GR

PAMELA C. HARDING, *et al.*,
*Plaintiffs,*

v.

RALPH P. EAGERTON, JR., as Commissioner of the Alabama Department of Revenue.
*Defendant.*

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FINAL ORDER

This action was brought pursuant to the Alabama Declaratory Judgment Act, Code of Alabama 1975, Sec. 6-6-220, et seq. Plaintiffs are seeking to have a determination made as to the construction of Sec. 36-21-2, Code, and its applicability to federal law enforcement officers. More specifically, Plaintiffs claim they are entitled to the same state income tax exemption received by state law enforcement officers for a $8.00 per day subsistence allowance provided to them by this statute. They also seek a refund and an injunction prohibiting the Department of Revenue from continuing to collect $8.00 per working day of their salaries.

Plaintiffs filed a Motion for Summary Judgment and the attorneys for the parties were present at the date and time scheduled for hearing. All of the parties stipulated and agreed in open Court that there were no disputed issues as to any material facts and that the issues before the Court could be resolved as a matter of law. The parties also stipulated that the constitutionality of Sec.

36-21-2, Code, is not in issue and is not contested. Furthermore, Plaintiffs are not challenging the right of the Alabama Legislature to grant an exemption to state employees.

On June 20, 1995 this Court certified this case as a class action and the class was defined as follows:

> All individuals employed by the United States of America, or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during any of the calendar years 1990, 1991, 1992, 1993, 1994, or 1995, and have, without a concluded final assessment determining tax liability, either paid Alabama state income tax thereon for any of the calendar years 1990, 1991, 1992, 1993, 1994, or 1995, or incurred potential Alabama state income tax liability for any of those calendar years.

Subsequently the Court granted motions to intervene by the Alabama State Police Association and the Alabama State Trooper Association, Inc. There was also substitution, in part, of the original plaintiffs and defendant and additional plaintiffs were named as members of the class.

Plaintiffs claim that there is a discriminatory tax scheme in violation of 4 U.S.C. Sec. 111 as a result of their not being given the same exemption afforded certain state law enforcement officers pursuant to Sec. 36-21-2, Code. At the outset it should be noted that the power to tax, or exempt certain income from taxation, is essentially a legislative function. See *Haden v. Watson*, 117 So.2d 694 (Ala. 1960).

Sec. 36-21-2, Code, was enacted in 1973 and provides that state law enforcement officers employed by certain departments and investigators employed by district attorneys on a full-time basis are to receive a subsistence allowance of $8.00 for each working day while engaged in the

performance of duties. This allowance is in addition to all other compensation, expenses and allowances. This statute also provides that the subsistence allowance shall not be subject to income tax.

Over the years the statute has been amended to add to the list of state law enforcement officers who are eligible to receive subsistence pay. However, correctional officers are phased in over eight years and subject to limitations. No specific mention was made as to taxation of this allowance until 1977 when a Joint Resolution, Act. No. 27 (Acts of 1973, p. 1145), was adopted setting forth the legislative intent. This resolution provided that the subsistence pay was an expense allowance to provide meals for officers on duty, that it was not to be considered as compensation and was not subject to federal or state income tax. In 1986, it was amended and 36-21-2(b), Code, now provides for the exclusion of the allowance from taxation.

Sec. 40-18-14, Code, defines "gross income" as including "gains, profits and income derived from salaries, wages, or compensation for personal services including the salaries, income, fees, and other compensation of state employees. It also includes income from any source not exempted by the income tax chapter and against which income there is no provision for a tax. Subsistence meal allowance constitute income for federal tax purposes. *Commissioner v. Kowalski*, 434 U.S. 77, 98 S. Ct. 315, 54 L.Ed.2d 252 (1977) and *County Com'n v. FOP, Lodge No. 64*, 558 So.2d 893 (Ala. 1989). State law enforcement officers pay federal income tax on the allowance and also may take job related expense deductions to off set the amount they receive.

Regarding other expenses received by law enforcements officers, federal employees are reimbursed per diem for travel both in-state and out-of-state. The amount received for travel is dependent in part on the location, number of

travel hours and there is one amount set for lodging and a separate amount set for meals and incidentals. State employees, including law enforcement officers, also receive travel reimbursement expenses. Travel reimbursement payments are not considered as part of either state or federal employees' income and neither are taxed on such reimbursements.

4 U.S.C. Sec. 111 provides, in part, that States may tax the pay of federal employees for personal services if such taxation does not discriminate because of the *source* of the compensation. In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989), it was held that Michigan's income tax scheme violated 4 U.S.C. Sec. 111 by fully taxing federal pensions and exempting state retirement benefits. Subsequently, in *Sizemore v. Rinehard*, 611 So.2d 1064, (Ala. Civ.App. 1992), it was held that Alabama's income taxation of military retirement violated 4 U.S.C. Sec. 111 and the doctrine of intergovernmental tax immunity. Refunds were ordered to be paid to the plaintiff classes and in response to *Davis* the Alabama Legislature remedied the matter by granting the same exemption to federal retirees. The Court would also note that the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, 40-2A-1 et. seq., Code, was enacted in 1992 which now contains procedures for taxpayers to obtain refunds. There is no evidence that any of the plaintiff class here has sought refunds.

The only issue before this Court is whether there is a violation of the intergovernmental tax immunity doctrine here. In both *Davis* and *Sizemore* the only difference in the retirees was the source of their retirement income. Those who received retirement income from the States received some exemptions while those who received the same type of income from the federal government did not. However, the Court is of the opinion that the situation here is not analogous to *Davis* or *Sizemore*.

In this case it is undisputed that federal law enforcement officers do not receive a comparable daily subsistence allowance from the federal government. It is also undisputed that the regular merit system salary of state law enforcement officers is taxed the same as the regular pay of federal law enforcement officers.

Plaintiffs contend that as law enforcement officers they meet all of the criteria of the statute and, therefore, are entitled to the state income tax exemption in that amount. However, only those state law enforcement officers enumerated receive subsistence pay. Neither state employees in general nor law enforcement officers in general receive the allowance and except for district attorney investigators other local law enforcement officers do not receive it. Suffice it to say that plaintiffs here do not meet the criteria as they are not in the class of employees the legislature has chosen to provide such additional allowance and tax exemption.

The State of Alabama is not giving differential tax treatment based on the *source* of income. It is simply not giving credit to law enforcement officers for pay not received by them. The inter-governmental tax immunity doctrine requires States to treat both federal and state employees the same but it does not require a State to give tax credits to employees for compensation not actually received by them. The Alabama Legislature chose to provide certain law enforcement officers with an additional allowance and the federal government has not. Whether or not federal law enforcement officers are given such benefits is in the province of the federal government and not state government or this Court. Of course, if they did receive such an allowance the State of Alabama would be required to give the same tax benefits to them as provided to state law enforcement officers.

In conclusion, the Court finds that the tax scheme in question does not discriminate because of the source of

the pay or compensation and, therefore, it is not violative of 4. U.S.C. Sec. 111. The Court has limited this decision to the sole issue before it and because this ruling is dispositive of this action it is not necessary to address any other possible legal consequences of the statute involved.

Finally, the Court is mindful that Plantiffs filed the Motion for Summary Judgment, however, since there are no disputed issues of fact and the parties have stipulated it can be resolved as a matter of law summary judgment is due to granted in favor of Defendant. In accord: *Adam v. Shelby County Com'n.*, 415 So.2d 1066 (Ala. 1982).

Wherefore, it is hereby ORDERED as follows:

1. That there exists a justiciable controversy between the parties appropriate for declaratory relief and it is further ORDERED that federal law enforcement officers are not entitled to a state income tax exemption for the subsistence allowance received by certain state law enforcement officers pursuant to Sec. 36-21-2, Code of Alabama 1975.

2. That Plaintiffs' request for refunds and to enjoin the Department of Revenue from taxing $8.00 per working day of their salaries is due to be and is hereby denied.

3. That judgment is hereby entered in favor of Defendant Commissioner of the Alabama Department of Revenue.

4. That costs of this matter are hereby taxed against plaintiffs.

Done this 14th day of May, 1996.

/s/ Sally Greenhaw
SALLY GREENHAW
Circuit Judge

Counsel of Record

## APPENDIX C

May 09, 1997

THE COURT OF CIVIL APPEALS
OF ALABAMA

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RE: 2951068

ROY C. CHEATHAM, *et al.*

v.

RALPH P. EAGERTON, as Commisioner, *et al.*

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(Appeal from Montgomery County Circuit Court:

CV 94-290)

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You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing. 39(k) Motion Denied.

/s/ John H. Wilkerson, Jr.
JOHN H. WILKERSON, JR.,
Clerk
Court of Civil Appeals

**APPENDIX D**

IN THE SUPREME COURT OF ALABAMA

August 22, 1997

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1961370

EX PARTE ROY C. CHEATHAM, *et al.*

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Petition for Writ of Certiorari to the Court of Civil Appeals (In re: Roy C. Cheatham, et al. v. Ralph P. Eagerton, as Commissioner, et al.) (2951068) (Montgomery: CV-94-290)

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CERTIFICATE OF JUDGMENT
Writ Denied

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The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PER CURIAM—Hooper, C.J., Maddox, Almon, Shores, Houston, Kennedy, Cook, Butts and See, JJ., concur.

## APPENDIX E

## CONSTITUTION OF THE UNITED STATES

### ARTICLE VI.—MISCELLANEOUS PROVISIONS

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## APPENDIX F

### 4 U.S.C. § 111

§ 111. Same; taxation affecting Federal employees; income tax

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

## APPENDIX G

## 1975 ALABAMA CODE

§ 36-21-2. Subsistence allowance for certain law enforcement officers.

(a) Any law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board, probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capitol Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of twelve dollars ($12) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

(b) The subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the 12 years beginning October 1, 1995. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the imple-

mentation of the one dollar ($1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended.

(d) The additional subsistence allowance added pursuant to Act 97-720 for all law enforcement officers listed in subsection (a), but excluding those officers listed in subsection (c), shall become effective October 1, 1997.

## APPENDIX H

## 1975 ALABAMA CODE

§ 40-18-2. Levied; persons and subjects taxable generally.

In addition to all other taxes now imposed by law, there is hereby levied and imposed a tax on the entire net income, as defined in this chapter, which tax shall be assessed, collected, and paid annually at the rate specified herein, upon the net taxable income for each calendar year as hereinafter provided. Persons and subjects taxable under this chapter are:

(1) Every individual residing in Alabama;

(2) Every corporation domiciled in Alabama or licensed or qualified to transact business in Alabama;

(3) Every corporation doing business in Alabama or deriving income from sources within Alabama, including income from property located in Alabama;

(4) Every resident individual or corporation acting in a fiduciary capacity;

(5) Every estate and trust resident in the State of Alabama;

(6) Every nonresident individual receiving taxable income from property owned or business transacted in Alabama;

(7) Every natural person domiciled in the State of Alabama, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be presumed to be residing within the state for the purposes of determining liability for income taxes under this chapter.

## APPENDIX I

Act No. 763 H. 286—Adams, Hearn, Snell

### AN ACT

To provide subsistence allowances for law enforcement officers while on duty and to authorize expenditure of funds for that purpose.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Any State law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, or Department of Agriculture and Industries shall receive a subsistence allowance of Five Dollars ($5.00) for each working day of a pay period while engaged in and in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided for such officers.

Section 2. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this Act are repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the governor, or upon its otherwise becoming a law.

Approved September 5, 1973.

Time: 5:30 p.m.

Act No. 99 S. 100—Gilmore

AN ACT

To amend Act No. 763, Regular Session, 1973, which relates to subsistence allowances for law enforcement officers while on duty and to authorize expenditure of funds for that purpose.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Any State law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, or the Transportation Enforcement Division of the Alabama Public Service Commission shall receive a subsistence allowance of Five Dollars ($5.00) for each working day of a pay period while engaged in and in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided for such officers.

Section 2. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this Act are repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved November 14, 1975.

Time: 2:45 P.M.

Act No. 84-306 H. 294—Reps. Biddle, Trammell, Payne, Pratt

AN ACT

To amend Section 36-21-2. Code of Alabama 1975, to increase the subsistence allowance paid to any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama Department of Forensic Sciences or the transportation enforcement division of the Alabama public service commission from $5.00 per day to $8.00 per day.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"Section 36-21-2. (a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama Department of Forensic Sciences or the transportation enforcement division of the Alabama public service commission shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on duty, and is not to be considered as compensation under the laws of this

state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved May 15, 1984.

Time: 2:15 P.M.

Act No. 85-754 H. 542—Rep. Holley

AN ACT

Relating to the subsistence allowance for certain law enforcement officers: to amend Section 36-21-2. Code of Alabama 1975, so as to provide that investigators employed by district attorneys shall be paid such allowance; and to make a supplemental appropriation for fiscal year 1985-86 to cover the cost.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2. Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for purpose of providing meals while said officers are on duty, and is not to be considered as compensation under the laws of this state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. There is hereby appropriated from the General Fund the amount necessary to fund the provisions of this act for fiscal year 1985-86.

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved May 29, 1985

Time: 8:00 P.M.

Act No. 86-433 H. 472—Rep. Browder

## AN ACT

To amend Section 36-21-2 of the Code of Alabama 1975, relating to subsistence allowance for certain law enforcement officers, so as to provide further for such allowance.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2. (a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverages control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This Act shall become effective upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved April 29, 1986

Time: 3:30 P.M.

Act No. 87-344 H. 139—Reps. Adams and Flowers

## AN ACT

To amend Section 36-21-2, Code of Alabama 1975, relating to the subsistence allowance for certain specified law enforcement officers, so as to extend the subsistence allowance provided therein to probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, and law enforcement officers of the state capitol police; and to make this act retroactive to January 21, 1987.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, law enforcement officers of the state capitol police or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This act shall become effective retroactive to January 21, 1987.

Approved July 2, 1987

Time: 9:10 A.M.

Act No. 87-814 S. 345—Senator Foshee

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, which provides for subsistence allowance for certain law enforcement officers, so as to provide a subsistence allowance for any law enforcement officer of the state of Alabama who is employed by the Liquefied Petroleum Gas Board.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, Alabama Liquefied Petroleum Gas Board or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved August 13, 1987

Time: 2:42 P.M.

Act No. 94-595 S. 103—Senator J. Smith

## AN ACT

To amend Section 36-21-2, Code of Alabama 1975, to provide further for the subsistence allowance of law enforcement officers to include on a graduated basis officers with the Department of Corrections.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, Alabama liquefied petroleum gas board or probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, law enforcement officers of the state capitol police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of eight dollars ($8) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

"(b) The subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government.

"(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the eight years beginning with the effective date of this act. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the implementation of the one dollar (1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended."

Section 2. The provisions of this amendatory act shall be implemented with the fiscal year beginning October 1, 1995.

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved April 22, 1994

Time: 4:35 P.M.

Act No. 97-720 S. 53—Senators Biddle, Dixon, Waggoner, Mitchem, Amari, Smith, and Davidson

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, to provide further for the subsistence allowance for certain law enforcement officers.

*Be It Enacted by the Legislature of Alabama:*

Section 1. Section 36-21-2, Code of Alabama 1975, is amended to read as follows:

"§ 36-21-2.

"(a) Any law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board, probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capitol Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of twelve dollars ($12) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

"(b) The subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

"(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the 12 years beginning October 1, 1995. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the implementation of the one dollar ($1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended.

"(d) The additional subsistence allowance added pursuant to this 1997 amendatory act for all law enforcement officers listed in subsection (a), but excluding those officers listed in subsection (c), shall become effective October 1, 1997."

Section 2. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

Approved May 29, 1997

Time: 5:22 P.M.

## APPENDIX J

CIRCUIT COURT
MONTGOMERY COUNTY, ALABAMA

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Civil Action No. ——

PAMELA C. HARDING, CHRISTOPHER L. HARDING, and WALTER J. BAMBERG, individually, and as representatives of the class,

*Plaintiffs,*

v.

GEORGE E. MINGLEDORFF III, Commissioner of the Alabama Department of Revenue,

*Defendant.*

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## COMPLAINT

1. Plaintiffs, Walter J. Bamberg, a resident citizen of Montgomery County, Alabama, and Pamela C. Harding and Christopher L. Harding, resident citizens of Chilton County, Alabama, are over the age of nineteen (19) years and have, during the calendar years 1990, 1991, 1992, and 1993, received wages from the government of the United States of America for services as a law enforcement officer, and have paid Alabama state income tax on such wages.

2. Defendant, Honorable George E. Mingledorff III, is the Commissioner (Acting) of the Alabama Department of Revenue (hereinafter referred to as "Department"), and is charged by law with the complete supervision and control of the application and enforcement of the tax laws of the State of Alabama pursuant to §§ 40-2-40 and 40-2-11, Code of Alabama 1975, and other relevant provisions of law.

3. The Plaintiffs bring this action on behalf of themselves and all members of a class of Plaintiffs composed of all individuals employed by the United States of America or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during calendar years 1990, 1991, 1992 or 1993, and have either paid Alabama state income tax thereon for any of the calendar years 1990, 1991, 1992, or 1993 or have a potential state income tax liability for any of those calendar years.

4. With respect to the propriety of a class action, the Plaintiffs aver the following:

(a) The class is so numerous that joinder of all its members would be impracticable;

(b) There are questions of law and fact common to the class, such as the legality of the application of State income taxes to a portion of the wages of the class members and the right of such class members to receive a refund for past payment of taxes on such income;

(c) Plaintiffs' claim is typical of claims of the class;

(d) In their representative capacity, the Plaintiffs will fairly and adequately protect the interests of the class;

(e) The prosecution of separate actions by the individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the Defendant herein;

(f) Defendant has acted or refused to act on grounds generally applicable to the class; thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole;

(g) Questions of law and fact common to the members of the class predominate over any question affecting only individual members, and that a class action is su-

perior to the other available methods for the fair and efficient adjudication of this controversy;

(h) The prosecution of separate actions by individual members of the class would create risk of adjudications for the respective individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(i) Failure to allow this cause to be maintained as a class action will result in many members of the class being unable to assert the rights requested herein in a timely fashion and would effectively deny the opportunity of such members to recover part or all of the taxes paid under an illegal and void taxation scheme.

5. Plaintiffs, on behalf of themselves and members of the class, seek a declaration pursuant to the Alabama Declaratory Judgment Act contained in Article 5 of Title 6, Code of Alabama 1975, to determine the construction and applicability of Alabama law and certain regulations of the Alabama Department of Revenue applying state income tax to wages of law enforcement officers employed by the United States of America or by its agencies; and to order relief in the form of an injunction prohibiting the collection of such taxes in the future and the reimbursement of all taxes collected pursuant to such statutes and regulations.

6. Plaintiffs aver that the Legislature of the state of Alabama, by and through § 40-18-2, has "levied and imposed a tax on the entire net income . . . [of]:

"(1) Every individual residing in Alabama;

. . .

"(6) Every nonresident individual receiving taxable income from property owned or business transacted in Alabama," but has, by and through § 36-21-2(b), Code

of Alabama 1975, as amended, granted an exemption from Alabama state income taxation to certain law enforcement officers employed by several agencies of the state of Alabama for that portion of their pay established by § 36-21-2(a) in the amount of "$8.00 for each working day . . . while engaged in the performance of his duties as a law enforcement officer." No such exemption exists for federal law enforcement officers and full state income taxation is applied by the Department to all wages of such federal officers.

7. Pursuant to § 40-18-2, the Department has promulgated regulations applying state income taxes to the entire wages of federal law enforcement officers, but exempting the state law enforcement officers described in § 36-21-2(a), Code of Alabama 1975, from wages totalling $8.00 per day. The regulations addressing state law enforcement officers provide as follows:

> Reg. 810-3-14-.02. Exclusions from Gross Income
>
> (1) Sec. 40-18-14(2) lists items which are not to be included in gross income. In addition to these items, items of income which Federal law prohibits the states from taxing, or which are exempt from taxation by the State of Alabama, are excluded from gross income.
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> * * * *
>
> (b) 1. EXAMPLE: Under various other Alabama statutes, the daily subsistence allowances paid to state law enforcement officers, . . . are excluded from gross income.
>
> 2. EXAMPLE: Effective for payments received after January 20, 1987, the daily subsistence allowance paid pursuant to [§]36-21-2 to probation and parole officers of the Alabama Board of Pardons and Paroles, to fire marshals of the Department of Insurance, to enforcement officers of this [the Revenue] Department and to law enforcement officers of the

State Capitol Police, are also excluded from gross income.

8. Plaintiffs, individually and on behalf of the class, contend that $8.00 per working day of wages for federal law enforcement officers, is exempt from state taxation pursuant to Section 111 of the Public Salary Tax Act of 1939, 4 U.S.C. § 111 (hereinafter referred to as the "Act") and the constitutional doctrine of intergovernmental tax immunity. Specifically, Plaintiffs claim that taxation of the wages of the class members as described, does not fall within the limited consent to state taxation granted by Congress in the Act, which, in relevant part, provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

9. The full taxation of the wages of federal law enforcement officers represents a discriminatory taxation scheme and does not fall within the exception granted by the Act, and, therefore, is violative of the constitutional doctrine of intergovernmental immunity, due to the fact that the state of Alabama provides a partial exemption from state income taxation to law enforcement officers employed by the state or its agencies. Such taxation also violates the mandate of § 40-18-3, Code of Alabama 1975, which provides:

> The salaries, fees commissions or other income of officers or agents of the United States or its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, *but without discrimination, and only to the*

*same extent and in the same manner as other income is taxed. . . .*

(emphasis supplied).

10. Plaintiffs submit that a justiciable controversy exists between George E. Mingledorff III, as Commissioner (Acting) of the Department of Revenue and the members of the class, including themselves. The justiciable controversy arises from Plaintiffs' contention that, contrary to the provisions of Alabama law, $8.00 per working day of the wages of law enforcement officers employed by the United States of America and its agencies, are not within the subjects of taxation permitted by 4 U.S.C. § 111, and the taxation thereof violates the Constitution and laws of the United States of America, requiring refunds to be granted.

11. The aforementioned state statute and the Department of Revenue regulations unconstitutionally tax federal compensation which is exempt from taxation and, therefore, are void and illegal. Plaintiffs challenge the legality of the aforementioned statutes and regulations in their entirety, not as they apply to a particular taxpayer.

12. Plaintiffs and members of the class have incurred tax liability to Defendant arising out of the assessment and collection of state income taxes on the salary of federal law enforcement officers, while the salaries of certain state law enforcement officers have been partially exempt, since 1988 or earlier.

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiff seeks the following relief against the Defendant:

1. An order pursuant to Rule 23(c)(1), A. R. Civ. P., allowing this cause to be maintained as a Plaintiff class action against the Defendant and further that the Court will allow such other orders as may be necessary and proper in the premises;

2. A judgment declaring that the state taxation of $8.00 per working day of the salary of federal law enforcement officers is illegal and void;

3. A permanent injunction against the Defendant from applying and collecting Alabama state income tax on that portion of the salaries of the Plaintiff class referred to;

4. An order requiring the Defendant to refund to the Plaintiff and members of the class all state income tax collected on that portion of their salaries on which such tax has been collected illegally;

5. An order requiring Defendant to pay Plaintiffs' attorneys a reasonable fee for representing the Plaintiffs and members of the class in the prosecution of this cause and for interest and costs;

6. Such further and different relief, whether legal or equitable, to which Plaintiffs and the class are justly entitled.

/s/ James M. Sizemore, Jr.
JAMES M. SIZEMORE, JR.

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